

No. DA 09-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SUMMER LEE MANYWHITEHORSES,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Julie Macek, Presiding

APPEARANCES:

ELI M. PARKER
Office of the State Public Defender
610 N. Woody Street
Missoula, Montana 59802-4143

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. APPELLEE MISCHARACTERIZES THE RECORD TO ARGUE THAT THE PROSECUTOR ABIDED BY THE PLEA AGREEMENT	2
II. APPELLEE MISCHARACTERIZES <i>HILL</i> AS AUTHORIZING THE PROSECUTOR’S PRESENTATION OF EVIDENCE AND ARGUMENTS THAT EMPHASIZED THE STATE’S DISMISSED CHARGE OF DELIBERATE HOMICIDE.....	5
III. THE PROSECUTOR’S PRESENTATION OF THE DISMISSED CHARGE OF DELIBERATE HOMICIDE AT SENTENCING MUST BE DISTINGUISHED FROM THE FACTS IN <i>HILL</i>	9
CONCLUSION.....	11
CERTIFICATE OF SERVICE	13
CERTIFICATE OF COMPLIANCE.....	14

TABLE OF AUTHORITIES

CASES

State v. Baldwin, 192 Mont. 521, 629 P.2d 222 (1981))	6
State v. Bowley, 282 Mont. 298, 938 P.2d 592 (1997))	9
State v. Collier, 277 Mont. 46, 919 P.2d 376 (1996)	6
State v. Herman, 2008 MT 187, 343 Mont. 494, 188 P.3d 978	6
State v. Hill, 2009 MT 134, 350 Mont. 296, 207 P.3d 307	passim
State v. Mason, 2003 MT 371, 319 Mont. 117, 82 P.3d 903	6
State v. Rardon (Rardon II), 2002 MT 345, 313 Mont. 321, 61 P.3d 132	9

OTHER AUTHORITY

<u>Montana Code Annotated</u> § 46-18-115(1)(2009)	7
---	---

Appellant Summer Lee Manywhitehorses (Manywhitehorses) replies to Appellee's brief as follows.

Manywhitehorses agrees with Appellee that the State was free to recommend the District Court impose a 100-year prison sentence under Montana's persistent felony offender (PFO) statute. Appellant's opening brief did not argue the State's 100-year sentence recommendation was unlawful. Rather, arguments and evidence used by the prosecutor to support that 100-year sentence recommendation breached the plea agreement. Accordingly, the State was free to recommend a 100-year prison sentence. However, the prosecutor breached the plea agreement by supporting that recommendation with arguments and evidence the State believed would demonstrate deliberate homicide.

Appellee's Response mischaracterizes and fails to account for the record as a whole. Instead, Appellee unlinks the connections that the prosecutor made between the State's witnesses at sentencing. This Court must consider the prosecutor's conduct as reflected by the whole record.

Taken in its entirety, the record reveals that the prosecutor induced Manywhitehorses to plead guilty to negligent homicide and to waive her constitutional protections. Once Manywhitehorses was vulnerable the prosecutor presented evidence and argued at sentencing that Manywhitehorses punched J.M. in the face or head, causing the fatal head injury that presumably killed her son.

Appellee argues that this Court's opinion in *State v. Hill*, 2009 MT 134, 350 Mont. 296, 207 P.3d 307, authorized the prosecutor's conduct in this case. Contrarily, this Court's opinion in *Hill* affirmed that prosecutors in plea agreements must meet strict and meticulous standards of both promise and performance. Additionally, the prosecutor's conduct in *Hill* drew dangerously close to breach of the plea agreement. In this case, the prosecutor's conduct went much farther.

I. APPELLEE MISCHARACTERIZES THE RECORD TO ARGUE THAT THE PROSECUTOR ABIDED BY THE PLEA AGREEMENT.

Appellee's Response argues that the prosecutor intended at sentencing to demonstrate the full picture of Manywhitehorses's negligence. Yet the record demonstrates that the prosecutor repeatedly undercut the factual basis for negligence. Additionally, the prosecutor developed the testimony of Detective McDermott and Dr. Wells in an explicit attempt to demonstrate that Manywhitehorses punched J.M. in the face or head and, thereby, caused his fatal head injury. Appellee's Response appears to ignore this portion of the sentencing transcript.

Appellee fails to reconcile the prosecutor's stated intent at sentencing with the record of his actual conduct. For instance, the prosecutor repeatedly undercut the factual basis for negligence by presenting several unanswered questions for the district court's consideration:

Why didn't Summer call 911 when it was very clear to her her son was failing? Number Two, how did [J.M.] end up in such critical condition in the first place? The testimony we are going to seek from Dr. Wells, which we've already had on the record, indicates he was suffering severe head injuries. Number three, why did Summer conceal [J.M.'s] body for so long?

(Sent. Tr. at 22:15-25, 23:1-2.)

Appellee's Response does not reconcile the prosecutor's stated intent of supporting the negligent homicide sentence with his actual conduct in emphasizing or raising doubt around Manywhitehorses's negligence in J.M.'s death.

The record contradicts Appellee's explanation of Dr. Wells' testimony. Appellee's Response states, "Dr. Wells' testimony did not undermine the factual basis of the guilty plea as Manywhitehorses suggests." (Appellee's Br. at 24.) Appellee argues that Dr. Wells actually confirmed the factual basis of Manywhitehorses's negligent homicide conviction. (Appellee's Br. at 24.)

Yet Dr. Wells stated, "in my opinion, it's exceedingly rare that that kind of short fall alone, a simple short fall, would be enough to cause the death of a child." (Sent. Tr. at 50:5-8.) The prosecutor solicited Dr. Wells' opinion of whether Manywhitehorses's explanation of J.M.'s death was credible. Dr. Wells testified that, in her expert opinion, Manywhitehorses's explanation was not credible. (Sent. Tr. at 45:21-25; 46:1-6.)

Appellee argues that Dr. Wells "did not offer testimony that Manywhitehorses intentionally killed her son." (Appellee's Br. at 24.) Contrarily,

Dr. Wells stated, “it was my opinion that his death was very likely the result of child physical abuse. . . .” (Sent. Tr. at 51:1-17.)

Accordingly, Appellee makes the inconsistent argument that Dr. Wells meant (a) Manywhitehorses’s abused J.M. and (b) J.M. died from child abuse, but (c) Manywhitehorses did not intentionally cause the alleged abuse that the State believes killed her son. (Appellee’s Br. at 24.) On its face, Appellee’s argument is self-contradictory and should be disregarded by this Court.

Finally, Appellee attempts to unlink connections the prosecutor made between witness testimony and Manywhitehorses’s alleged culpability for deliberate homicide. When the district court requested an explanation of the State’s evidence of child abuse at sentencing for negligent homicide, the prosecutor explained, “we believe there’s plenty of evidence of this defendant punching her child in the face to support that she may have been part of that head injury.” (Sent. Tr. at 26:9-11.) The prosecutor stated, “[t]his negligent homicide happened for a reason we believe.” (Sent. Tr. at 23:4-5.)

II. APPELLEE MISCHARACTERIZES *HILL* AS AUTHORIZING THE PROSECUTOR’S PRESENTATION OF EVIDENCE AND ARGUMENTS THAT EMPHASIZED THE STATE’S DISMISSED CHARGE OF DELIBERATE HOMICIDE.

Appellee argues that this Court’s decision in *Hill* authorized the prosecutor at sentencing to emphasize the State’s evidence of deliberate homicide. Contrarily, *Hill* affirmed the prosecutor’s duty to meet strict and meticulous standards of promise and performance under the plea agreement. *Hill*, ¶ 29. The prosecutor violated this duty by contradicting the factual basis for Manywhitehorses’s negligent homicide conviction.

In *Hill*, this Court determined the prosecutor “came dangerously close to breaching the plea agreement.” *Hill*, ¶ 30. The State charged Hill in two separate cases. Under the plea agreement, Hill pled guilty to attempted sexual intercourse without consent against N.T. In exchange, the State dismissed the second case. That case involved Hill’s alleged sexual abuse of a minor named K.S. Besides N.T. and K.S., Hill also had “a long, substantial, and documented history of sexual contacts with children resulting in opinions of treatment providers, professional evaluators, and probation officers that he [was] a danger to the community.” *Hill*, ¶ 33. Accordingly, the sentencing court knew of Hill’s history and the case involving K.S. through channels outside the purview of the prosecutor.

Before sentencing, the prosecutor filed a memorandum reminding the sentencing court to consider Hill’s other victims, including K.S. The prosecutor

indicated the offense was not dismissed for lack of evidence. Finally, the prosecutor indicated K.S. was willing to participate in Hill's prosecution. *Hill*, ¶ 25.

On appeal, Hill argued that the prosecutor breached the plea agreement. According to Hill, the prosecutor breached the plea agreement by encouraging the sentencing court not to forget K.S., indicating that K.S. was willing to testify, and characterizing K.S. as a victim. Hill's argument failed.

This Court determined the prosecutor did not breach the plea agreement. For the most part, the prosecutor in *Hill* merely reminded the sentencing court what it already knew. A sentencing court may consider any relevant evidence relating to the character of the defendant, his history, his mental and physical condition, and the broad spectrum of incidents making up his background. This included acts dismissed in the case involving K.S. *Hill*, ¶ 31 (*citing State v. Mason*, 2003 MT 371, ¶¶ 23-25, 319 Mont. 117, 82 P.3d 903, *overruled on other grounds*, *State v. Herman*, 2008 MT 187, 343 Mont. 494, 188 P.3d 978; *State v. Collier*, 277 Mont. 46, 63, 919 P.2d 376, 387 (1996); *State v. Baldwin*, 192 Mont. 521, 524, 629 P.2d 222, 224 (1981)). The prosecutor's sentencing memorandum reminded the sentencing court of information already available for the court's consideration.

Nevertheless, the prosecutor “came dangerously close to breaching the plea agreement.” *Hill*, ¶ 30. This Court rebuked the prosecutor for stating in his sentencing memorandum that the case involving K.S. was not dismissed for lack of evidence, characterizing K.S. as a victim, and indicating that K.S. would participate in Hill’s prosecution.

However, this Court determined the prosecutor stopped just short of breach. The sentencing court knew of Hill’s history through channels outside the prosecutor’s purview, such as the pre-sentence investigation report. Montana statute provided the sentencing court authority to consider Hill’s history, which included allegations contained in the dismissed charge. Mont. Code Ann. § 46-18-115(1)(2009). Given Hill’s “long, substantial, and documented history of sexual contacts with children,” the prosecutor’s sentencing memorandum placed the dismissed charge in the context of Hill’s pattern of sexually predatory behavior. Accordingly, the prosecutor’s comments did not constitute a breach of the plea agreement “under the circumstances” particular to *Hill*. *See Hill*, ¶ 33. Significantly, the prosecutor did not present evidence or arguments for the dismissed charge, but merely expressed his conclusions about that case.

Finally, this Court noted the plea agreement did not require the state to refrain from reminding the sentencing court of the dismissed charge involving K.S. Consequently, the State could remind the sentencing court of that dismissed

charge, absent a contradictory term in the plea agreement. Nevertheless, the prosecutor's reminder veered dangerously close to breach; therefore, something more than the prosecutor's reminder would constitute breach. Significantly, the prosecutor did not present arguments or evidence for the dismissed charge, but merely stated his conclusions that K.S. was Hill's victim, K.S. would participate in the prosecution, and the case was not dismissed for lack of evidence.

Appellee's Response relies upon *Hill* as the lynchpin of the State's argument on appeal. Under Appellee's interpretation, *Hill* authorized the prosecutor to present "any matter relevant to the disposition" of Manywhitehorses's negligent homicide sentence, including the State's evidence and arguments for deliberate homicide. Appellee argues that the sentencing court was wrong under *Hill* to limit the prosecutor's solicitation of testimony from Detective McDermott regarding allegations Manywhitehorses physically abused J.M. Since Manywhitehorses was designated PFO, Appellee argues that *Hill* permitted the prosecutor to present any relevant evidence to support the State's 100-year sentence recommendation, regardless of whether the prosecutor's solicitation of testimony tended to produce evidence to contradict the negligent homicide conviction.

Contrary to Appellee's interpretation, *Hill* did not authorize the prosecutor in this case to present evidence that contradicted the factual basis of Manywhitehorses's negligent homicide conviction. *Hill* affirmed precedence of

this Court requiring prosecutors to meet strict and meticulous standards of both promise and performance under the plea agreement. In effect, Appellee's interpretation of *Hill* overrules this Court's long line of precedence prohibiting a prosecutor from retaining the benefit of a defendant's guilty plea while avoiding the State's obligations under the plea agreement. *State v. Rardon (Rardon II)*, 2002 MT 345, ¶ 18, 313 Mont. 321, 61 P.3d 132 (citing *State v. Bowley*, 282 Mont. 298, 314, 938 P.2d 592, 601(1997)).

III. THE PROSECUTOR'S PRESENTATION OF THE DISMISSED CHARGE OF DELIBERATE HOMICIDE AT SENTENCING MUST BE DISTINGUISHED FROM THE FACTS IN *HILL*.

Finally, *Hill* must be distinguished from the present case in two ways. Even if Appellee's interpretation of *Hill* is correct, *Hill* does not apply to Manywhitehorses's appeal. Therefore, Appellee's reliance upon *Hill* is ill founded in this matter.

First, this Court determined the prosecutor's presentation in *Hill* did not violate any term contained in the plea agreement. *Hill*, ¶ 30. Accordingly, the State in *Hill* did not agree to refrain from reminding the sentencing court of Hill's offense against K.S.

In this case, the prosecutor's discussion of the dismissed charge did violate the terms of the plea agreement. The State agreed to dismiss the deliberate

homicide charge against Manywhitehorses and recommend a sentence for her negligent homicide conviction.

Negligent homicide and deliberate homicide were alternative charges in this matter. Furthermore, negligent homicide and deliberate homicide have different mental states.

At sentencing, the prosecutor argued that Manywhitehorses punched her son in the face and caused the head injury that killed J.M. (Sent. Tr. at 23:4-5, 26:7-11, 51:1-17.) Therefore, the prosecutor contradicted the factual basis of a negligent mental state and, thereby, violated the terms of the plea agreement that required the State to recommend a sentence for negligent homicide. Consequently, *Hill* must be distinguished from the present case.

Second, the prosecutor in *Hill* discussed the dismissed charge in a sentencing memorandum delivered to Hill before the sentencing hearing. Thereby, the prosecutor merely reminded the sentencing court that the dismissed charge was consistent with Hill's extensive history, which the court already knew well through channels outside the purview of the prosecutor. This Court determined that that much did not constitute breach, but came dangerously close.

Rather than a sentencing memo, the prosecutor in this case presented arguments and evidence for the dismissed charge in an extensive sentencing hearing that involved testimonial and exhibitory evidence. The prosecutor raised

several questions about the factual basis for Manywhitehorses's negligent homicide conviction. (Sent. Tr. at 22:15-25, 23:1-2.) Furthermore, the prosecutor solicited and development the testimony of Detective McDermott and Dr. Wells to argue that Manywhitehorses caused J.M.'s fatal head injury by punching him in his face or head.

The prosecutor in *Hill* veered dangerously close to breaching the plea agreement by offering legal conclusions about the dismissed charge. In this case, the prosecutor charged past the boundary discussed in *Hill* to present evidence and arguments for the dismissed charge of deliberate homicide. Even if *Hill* authorized the prosecutor to present evidence of the dismissed charge, *Hill* must be distinguished from the present case.

CONCLUSION

Appellee's Response mischaracterizes the record to argue that the prosecutor abided by the plea agreement. Additionally, Appellee mischaracterizes *Hill* as authorizing the prosecutor's presentation of evidence and arguments that emphasized the State's dismissed charge of deliberate homicide. Finally, the prosecutor's presentation of the dismissed charge of deliberate homicide at sentencing must be distinguished from the facts in *Hill*.

Taken in its entirety, the record reveals that the prosecutor induced Manywhitehorses to plead guilty to negligent homicide and to waive her

constitutional protections. Once Manywhitehorses was vulnerable the prosecutor presented evidence and argued at sentencing that Manywhitehorses punched J.M. in the face or head, causing the fatal head injury that presumably killed her son.

The prosecutor failed to meet the strict and meticulous standards of both promise and performance required of the State under the plea agreement.

Consequently, the prosecutor violated the plea agreement and rendered Manywhitehorses's guilty plea "involuntary and subject to vacation." Therefore, Manywhitehorses respectfully requests this Court remand this matter for resentencing and provide her a choice between the equitable remedies of either rescission or specific performance.

Respectfully submitted this ____ day of July, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Region 2 – Missoula
610 North Woody
Missoula, MT 59802

By: _____
ELI M. PARKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply
brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

SUMMER MANYWHITEHORSES 2106034
Montana Womens Prison
701 South 27th Street
Billings, MT 59101

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

ELI M. PARKER